92-1865

Supreme Court, U.S.
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No._____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

WILLIAM JUSTIN DeLEONARDIS,
Petitioner,
v.
KATHLEEN DAY KOCH, Special Counsel office of the Special Counsel,
Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I.

Is the Office of the Special Counsel required to conduct an investigation of constitutional violations in effecting an adverse personnel action against a federal employee in the excepted service who has no direct appeal rights to the Merit System Protection Board, or other judicial forum, for vindication of those rights?

II.

May access to a judicial forum to vindicate constitutional rights be arbitrarily foreclosed in absence of clear congressional intent to preclude judicial review of constitutional claims?

LIST OF PARTIES TO PROCEEDING IN COURT BELOW

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NO._____

IN THE

Supreme Court of the United States

October Term, 1992

WILLIAM JUSTIN DeLEONARDIS,
Petitioner

vs.

KATHLEEN DAY KOCH, Special Counsel
Office of the Special Counsel,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this action on January 12, 1993. The request for rehearing was denied on March 2, 1993.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit (Docket No. 92-2580, January 12, 1993, unpublished), whose judgment is herein sought to be reviewed, is reprinted in Appendix A to this Petition. The opinion of the United States District Court for the Southern District of

Texas [Houston Division] (Civil Action No. H-90-3768, July 2, 1992, unpublished) is reprinted in Appendix B to this Petition.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on January 12, 1993. The Order denying the request for rehearing was entered on March 2, 1993. The jurisdiction of this Court is invoked pursuant to 28 USC 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the First Amendment to the United States Constitution, which provides as follows:

> "Congress shall make no law....abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

This case also involves the following statutes found in title V of the United States Code:
5 USC 1212

(a) The Office of the Special Counsel shall -

(1) in accordance with section 1214(a) and other applicable provisions of this subchapter, protect employees, former employees, and applicants for employment from prohibited personnel practices;

(2) receive and investigate allegations of prohibited personnel practices, and, where appropriate —

(A) bring petitions for stays, and petitions for corrective actions, under section 1214; and

(B) file or complaint or make recommendations for disciplinary action under section 1215.

5 USC 1214

(a)(1)(A) The Special Counsel shall receive any allegation of a prohibited personnel practice and shall investigate the allegation to the extent necessary to determine whether there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken.

STATEMENT OF THE CASE

Facts

The Civil Service Reform Act of 1978 (CSRA) overhauled the civil service system. Among its provisions, it provided for appeals procedures for federal employees affected by adverse personnel actions. Employees in the competitive service have direct appeal rights to the Merit System Protection Board (MSPB) and to the Court of Appeals for the Federal Circuit. Prior to enactment of the Civil Service Due Process Amendment [P.L. 101-376] on August 17, 1990, employees in the excepted service had no direct appeal rights. They could, however, petition the Office of the Special Counsel (OSC) to investigate claims of

prohibited personnel practice pursuant to chapters 12 and 23 of title V of the United States Code and to have OSC present their cases to the MSPB on their behalf. See generally: *United States v. Fausto*, 484 US 439, 108 S.Ct. 668 (1988).

The petitioner is an attorney in the excepted service. From January 1986 until June 1990, he was the supervisory attorney in the Office of Hearings and Appeals of the Social Security Administration in Houston, Texas. During that time, he received outstanding services awards every year. He was, and still is, highly respected by every Administrative Law Judge in the Houston office as well as by his coworkers. Handicapped by cerebral palsy, he is proud of his achievements.

The petitioner is also homosexual. He wrote a short story under a pen name during offduty hours for a gay publication. When Regional Chief Administrative Law Judge Richard Alois Mueller learned of the story through a spurious claim of sexual harassment by a disgruntled employee whom the petitioner recommended be fired for dishonest conduct, Judge Mueller demoted the petitioner. Judge Mueller, and the agency, upheld the firing of the disgruntled employee for dishonest conduct and recognized that his claim of sexual harassment was false. The petitioner was demoted just two months before Congress enacted the Civil Service Due Process Amendment which now gives the petitioner, and tens of thousands other federal employees in the excepted service, appeal rights to the MSPB. See: House Report No. 101-328, reprinted in *4 US Code Congressional and Administrative News* (1990) at pages 695-700.

The petitioner filed a complaint with OSC alleging that his demotion was a homophobic reaction by Judge Mueller in violation of his right of free speech and association protected by the First Amendment to the United States Constitution. OSC in return sent the petitioner a letter dated

November 13, 1990, stating that it would not investigate the claim. The petitioner then commenced an action in the United States District Court for the Southern District of Texas pursuant to 28 USC 1331 [federal question jurisdiction]. He appealed the Final Judgment of the district court to the United States Court of Appeals for the Fifth Circuit pursuant to 28 USC 1291.

The Rulings Below

The United States District Court ruled that OSC had conducted a "preliminary investigation" of the petitioners's allegations. It held that the petitioner did not contend that OSC failed to investigate his complaint but that the investigation was inadequate. Accordingly, the district court ruled it had no power to order OSC to conduct an additional investigation.

The Court of Appeals agreed with the district court. It stated:

> "Although the record in this case demonstrates rather serious unfairness in the demotion of DeLeonardis, it is a wrong that is beyond the authority of this court to redress."

The Court of Appeals also noted, in passing, that the petitioner's settlement of a separate claim of handicap discrimination which provided for an expungement of the record of demotion and any evidence relating to the demotion. The Court of Appeals stated:

> "... even if we were to compel the OSC to reinstate and perform a full investigation, it would be placed in the impossible situation of

> reviewing a record expunged of any evidence of the potential wrongdoing."

The district court's grant of summary judgment in favor of OSC was affirmed.

REASONS FOR GRANTING THE WRIT

I.

Certiorari Should Be Granted To Resolve A Conflict Between Circuits

A.

An adverse personnel action taken against a federal employee in violation of constitutional rights is a prohibited personnel practice falling within the purview of OSC. *Pinar v. Dole*, 747 F. 2d 899, 908 (4th Cir. 1984).

The opinion of the Court of Appeals acknowledged that the petitioner alleged constitutional violations in effecting his demotion and that "the record in this case demonstrates rather serious unfairness in the demotion." In his Petition for Panel Rehearing, the petitioner pointed out an error of fact on the face of the opinion of the Court of Appeals: THERE WAS NO INVESTIGATION OF THE COMPLAINT AND THERE WAS NO PRELIMINARY INQUIRY MADE INTO THE COMPLAINT BY OSC.

The Court of Appeals, nevertheless, ruled that it had no authority to compel OSC to conduct an investigation of the alleged constitutional violations.

This holding conflicts with the opinion of the Court of Appeals for the Fourth Circuit in *Pinar*, supra. The issue in *Pinar* was whether the CSRA provided an adequate remedy for deprivation of constitutional rights when there is no right of appeal to the MSPB.

In that case, Pinar received a letter of reprimand and a two-day suspension. Although he was an employee in the competitive service, he had no right of appeal to the MSPB for this minor disciplinary action. He could, however, petition OSC to investigate an alleged violation of rights under the First Amendment. He attempted to bring a *Bivens*-type damage action against his supervisor on the theory that his remedy for violation of constitutional rights under the CSRA was inadequate. In rejecting this claim, the Fourth Circuit cited the legislative history of the CSRA [747 F.2d 899 at 908]:

> "The legislative history of the CSRA reveals that the Special Counsel can decline to investigate a charge only if it 'appears groundless and frivolous on its face' S. Rep. No. 95-969, 95th Cong., 2nd Sess., reprinted in 1978 U.S. Code Cong. & Admin. News at 2754."

The governing statutes are expressed in terms of mandatory language: OSC *shall* protect federal employees from prohibited personnel practices (5 USC 1212(a)), and OSC *shall* investigate allegations of prohibited personnel practices (5 USC 1214(a)).

The legislative history of the CSRA further shows that Congress intended the evidentiary requirement to trigger an investigation to be minimal:

> "The Special Counsel would not require information amounting to 'probable cause' to conduct an investigation. Only a reasonable belief that a violation has occurred or will occur is sufficient basis for investigation."

See: *4 US Code Congressional and Administrative News* (1978) at 2754.

The opinion of the Court of Appeals for the Fifth Circuit recognized that the petitioner alleged a violation of his constitutional rights and also recognized that the "record demonstrates rather serious unfairness". In ruling that it had no power to compel OSC to conduct an investigation of the alleged constitutional violations, the Fifth Circuit ruling is contrary to the intent of Congress and the holding in the Fourth Circuit.

B.

Additionally, the ruling of the Fifth Circuit conflicts with the Court of Appeals for the District of Columbia on whose ruling the Fifth Circuit relied. See: *Wren v. Merit System Protection Board*, 681 F. 2d 867 (DC Cir. 1982).

The Court in *Wren* observed [681 F.2d at 875]:

> ".... there should be a remedy for petitioner where the OSC has failed to perform even that initial inquiry into the whistleblowing allegation, *and its rea-*

> *sons for inaction are legally invalid.*" [emphasis added]

In footnote 9, the Court indicate that "OSC does not have totally unreviewable discretion to refuse to look at the complaint altogether or to refuse to look at it for reasons unauthorized by the statute." The dictum of the case states that a limited judicial review of OSC's decision not to investigate a complaint may be had in a mandamus action filed in a United States district court.

The petitioner argued to the Court of Appeals for the Fifth Circuit that (1) no investigation of his complaint was done, or even a preliminary inquiry made into his allegations, and (2) the reason for OSC's inaction was legally invalid. The Fifth Circuit even recognized that OSC applied an incorrect legal standard in assuming a nexus between the alleged offduty misconduct and the petitioner's performance, which remained outstanding. The ruling of the Fifth Circuit that it had no authority to remedy the wrong, therefore, is inconsistent with the opinion of the District of Columbia Circuit on whose case the Fifth Circuit relied.

C.

The Respondent, in filing a "Motion for Publication of the Decision" [Appendix D], believed that this case established significant new law for the Fifth Circuit and that the issue presented by the appeal "is likely to recur, as other federal employees within the Fifth Circuit's jurisdiction may petition the Office of Special Counsel for review of alleged prohibited personnel practices. The existence of published Fifth Circuit authority defining the scope of judicial review of such actions will promote the uniform and expeditious resolution of similar cases in the future."

In filing this Motion, the Respondent has conceded that the importance of this case extends to thousands of other federal employees who, like the petitioner, may have no direct appeal rights to the MSPB; who may file similar actions and seek alternative relief if OSC refuses to investigate claims of prohibited personnel practices; and who may have their cases decided differently depending upon whether they reside in the Fifth Circuit's jurisdiction or the Fourth Circuit's jurisdiction.

Therefore, the fact that the petitioner settled a separate claim of handicap discrimination does not render this case moot. Even if one of several claims becomes moot, the case is *not* moot so long as any of the remaining claims for relief is viable, whether that claim was the primary or secondary relief sought. *Powell v. McCormack*, 395 US 486, 496-499; 89 S.Ct. 1944, 1950-1953 (1969).

The petitioner is permitted to settle a separate claim of discrimination against a separate defendant (Department of Health and Human Services) and still pursue the present action against OSC because he specifically retained that right in the settlement agreement in order to exhaust his administrative remedies on his constitutional claims through OSC. Accordingly, this claim is not mooted by the settlement of his discrimination claim and, in any event, the issue is likely to recur. See: *DeFunis v. Odegaard*, 416 US 312, 319-320, 94 S.Ct. 1704, 1707 (1974).

Reservation of rights is a basic tenet of any accord and satisfaction agreement. In *Ivy v. Meridian Coca-Cola Bottling Co.*, [108 FRD 118 at 125 (SD Miss. 1985)], the plaintiff filed a complaint of discrimination with the EEOC and settled the complaint. Subsequently, a class action suit was commenced growing out of the same discrimination incident. The court found that he was not precluded from

being a member of the class despite the prior settlement. Accordingly, the petitioner should be allowed to pursue a separate cause of action against a separate defendant (OSC) if the plaintiff in *Ivy* was allowed to pursue the same cause of action against the same defendant after settlement.

Contrary to the opinion of the Court of Appeals, the petitioner has not made it impossible for OSC to investigate the wrongdoing which the Court so aptly identified. The petitioner's rights under the First Amendment were violated. He retained the right to pursue the matter (that is, to be made whole by reinstatement to his position as supervisory attorney on constitutional grounds through OSC). All of the documents evidencing the wrongdoing exist in the court record as well as the investigative file of the EEO complaint. All of the parties are alive and still employed by the federal government, including witnesses whose affidavits are likely to be favorable to the petitioner.

The error of fact on this point which the Court of Appeals fails to recognize is that the petitioner is not seeking to have a physical form entitled "Notice of Personnel Action" indicating a voluntary downgrade redressed. He is not seeking to have a "document" redressed. It is the unconstitutional actions of his agency superiors which led to the downgrade (the "serious unfairness") which must be investigated. There is certainly a difference between the two.

The petitioner submits that if the Court of Appeals is saying that he does not have a substantive right to have his claims investigated, that position is contrary to law. If the Court of Appeals is saying that no vehicle exists to remedy his claim or that it is logically impossible to remedy his claim, then the Court is also incorrect because he has preserved his constitutional rights, and the tangible matter evidencing the constitutional violation is extant.

II.

Certiorari Should Be Granted Because the Ruling of The Court Of Appeals For The Fifth Circuit Conflicts With Decisions Of This Court

The petitioner brought this action in the United States district court pursuant to 28 USC 1331 [federal question jurisdiction] and not 28 USC 1361 [actions in the nature of mandamus]. He asked the court to review the legal standard employed by OSC in refusing to investigate his claims. He was not asking the court to compel OSC to exercise its discretion in any particular way. This Court has consistently upheld three fundamental principles of administrative law:

> 1. In reviewing the decision of an administrative agency, the court must judge the propriety of the decision solely on the grounds invoked by the agency. If those grounds are inadequate or improper, the court cannot affirm the agency's decision by substituting what it considers to be a more adequate or proper basis. *Securities and Exchange Commission v. Chenery Corp.*, 332 US 194, 196; 67 S.Ct. 1575, 1577 (1947).

> 2. When an administrative agency has made an error of law, the duty of the Court is to correct the error of law and remand the case to the agency so as to afford it the opportunity of examining the evidence and finding facts as required by law. *N.L.R.B. v. Enterprise Association of Steam, Hot Water, Hydraulic Sprinkler, Pneumatic Tube, Ice Machine and General Pipefitters of New York and Vicinity, Local Union No. 638*, 429 US 507, 522; 97 S.Ct. 891, 900 (note 9) (1977)

3. If an agency has misapplied the law, its order cannot stand --- even if the reviewing court believes the agency either would reinstate its order under a different theory or would reach the same decision under the proper rule of law. The case must be remanded to the agency for a new determination. The courts have the authority and responsibility to correct errors of law made by administrative agencies. *Florida Dept. of Labor and Employment Security v. U. S. Depart. of Labor*, 893 F.2d 1319 (11th Cir. 1990), cert. denied 111 S.Ct. 49 (1990). In *Wren v. Merit System Protection Board*, supra, the Court observed that the reason for OSC's failure to investigate the plaintiff's charge was legally invalid and, for that reason, was entitled to a limited judicial review of OSC's inaction in a proceeding in the United States district court.

The Fifth Circuit, contrary to the decisions of this Court and contrary to the decision in *Wren* upon which it relied, found that OSC had applied an incorrect legal standard in attributing a nexus between the petitioner's alleged offduty misconduct (which misconduct was never defined or established) and his work performance, which the Court of Appeals acknowledged that the record showed was "outstanding." The Court, nevertheless, stated that "forcing the OSC to conduct the investigation because of this error would be a reversal of the agency's discretion on substantive grounds. [Opinion at page 6, footnote 9].

The Fifth Circuit's ruling, therefore, is contrary to the decisions of this Court which uphold the principle that courts have both the authority and responsibility to correct errors of law made by administrative agencies and to remand the case to the agencies for new determinations in light of the proper legal standard. The Fifth Circuit's ruling is also contrary to

the *Wren* case in the District of Columbia Circuit which recognized that if OSC's inaction on a charge is legally invalid, a plaintiff may be entitled to relief in a proceeding in a United States district court.

The respondent urged publication of the Fifth Circuit's decision because of its precedential value. The petitioner submits that cases of precedential value within a judicial circuit may not conflict with the well-established principles laid down by the Supreme Court. The petitioner's case is one of first impression before the Fifth Circuit as well as this Court. The issue presented has been dealt with only in footnotes in the Fifth Circuit and the District of Columbia Circuit. The Fourth Circuit has ruled that OSC *must investigate* charges of constitutional violations unless the charges are groundless and frivolous on their face. Accordingly, this Court should grant the writ of certiorari to ensure consistency among the circuits and with the decisions of this Court.

III.

Certiorari Should Be Granted Because Access To A Judicial Forum For Vindication of Constitutional Rights Is A Special and Important Right To Be Protected By The Federal Courts

To hold that OSC cannot be compelled to conduct an investigation of constitutional claims is to vest an executive agency with the sole authority to determine the constitutional rights of federal employees in the excepted service who have no appeal rights to the MSPB, or other judicial forum, for vindication of those rights.

In *Webster v. Doe*, 486 US 592, 108 S. Ct. 2047 (1988), this Court held that the decision of the Director of the Central Intelligence Agency to terminate an employee

because he was homosexual under a provision of the National Security Act was not subject to judicial review under the Administrative Procedures Act. The Court, nevertheless, held that the employee's claims under the First, Fourth, Fifth, and Ninth Amendments to the United States Constitution were subject to judicial review in absence of a clear congressional intent to preclude such review. This Court stated [486 US at 603 and 108 S.Ct at 2053]:

> "We do not think section 102(c) [of the National Security Act] may be read to exclude review of constitutional claims. We emphasized in *Johnson v. Robinson* [citations omitted] that where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear. In *Salfi v. Weinberger* [citations omitted] we affirmed that view. We require this heightened showing in part to avoid the 'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim."

The petitioner argued in the United States District Court and in the Court of Appeals that if OSC arbitrarily refuses to investigate his claims of constitutional violations, and if the courts have no authority to compel such investigation even when the record "demonstrates rather serious unfairness," then his remedy under the CSRA is inadequate. The remedy is inadequate because his access to a judicial forum to vindicate his constitutional rights has been arbitrarily foreclosed by a federal agency in absence of a clear congressional intent to do so. He further argued that his case should be remanded to the district court to amend the Complaint to bring suit for reinstatement to his position on

constitutional grounds and for vindication of his constitutional rights.

This Court has ruled that the comprehensive nature of the CSRA evinces a congressional intent to replace "the patchwork system with an integrated scheme of administrative and judicial review, designed to balance the legitimate interests of the various categories of federal employees with the needs of sound and efficient administration." The Court held that the CSRA precluded an employee in the excepted service from seeking relief under the Tucker Act for a wrongful suspension even though the CSRA did not provide him with the right to judicial review of the adverse personnel action. *United States v. Fausto*, 484 US 439, 108 S.Ct. 668 (1988).

The *Fausto* case, however, raised no constitutional claim. Consequently, this Court did not address the issue of whether the CSRA was also intended to replace judicially-created remedies for deprivation of constitutional rights. The concurring opinion of Justice Blackmun in *Fausto* contained the following caveat [484 US at 455, 108 S.Ct at 677]:

> "I do not believe, nor do I read the majority opinion to suggest, that our well-established aversion to recognizing 'implied' repeals of remedial provisions or of judicial review is any weaker when what is 'repealed' finds its source in our cases rather than in specific statutory texts. For example, this Court long has recognized that the Constitution itself supports a private damages action against a federal official, and that the court's common-law power to vindicate constitutional rights is not lightly to be set aside." [citations omitted]

In addressing the issue of whether the CSRA was intended to take away an employee's pre-existing right of action to pursue constitutional rights in district court actions, the Court of Appeals for the District of Columbia stated:

> "We think not. Where newly enacted statutory remedies are unavailable to a particular segment of employees, the Supreme Court appears to have imposed a kind of 'clear statement' requirement on Congress, requiring it to indicate explicitly its intent to displace judicially-created remedies for constitutional deprivations."
>
> * * *
>
> "We do not here presume to rule on the issue of whether the CSRA appeal procedure culminating in judicial review for tenured employees are the exclusive means of relief. We decide only the limited statutory remedy provided probationary employees, who have no appeal to the MSPB or to a judicial forum at all from an adverse personnel action or from and OSC decision not to prosecute, is not adequate enough substitute for a prior judicial cause of action so that we can infer from the statute a Congressional desire to eliminate the preexisting right."
>
> * * *
>
> "We would, furthermore, be hard pressed to deny jurisdiction over a constitutional claim when the only alternative statutory remedy allows no right of individual participation by the injured employee and permits no judicial review of the merits of the agency official's

> decision not to investigate or prosecute the employee's claim."

Borrell v. U. S. International Communications Agency, 682 F. 2d 981 at 989-990 (DC Cir. 1982), cited with approval in *Towers v. Horner*, 791 F. 2d 1244, 1247-1248 (5th Cir. 1986).

The opinion of the Court of Appeals for the Fifth Circuit has totally ignored the petitioner's argument that, if petitioning OSC for redress of his constitutional claims cannot be compelled by the court, he has an alternative remedy in bringing an action in the United States district court under the First Amendment pursuant to 28 USC 1331 for vindication of his constitutional rights. In its opinion, the Court of Appeals stated:

> " Although the record in this case demonstrates rather serious unfairness in the demotion of DeLeonardis, it is a wrong that is beyond the authority of this court to redress."

This position is contrary to law, and it affects a large number of federal employees in the excepted service who have no appeal rights to the MSPB or other judicial forum. Accordingly, this Court should exercise its power to review the decisions of the Courts of Appeals for the Fifth Circuit, the Fourth Circuit, and the District of Columbia on this issue.

CONCLUSION

The respondent has urged the Court of Appeals for the Fifth Circuit to publish its decision because of its precedential value and because it affects other federal employees who have no appeal rights to the MSPB except through petitioning OSC. Inasmuch as this case is one of first impression before this Court, and inasmuch as the opinion of the Court of Appeals for the Fifth Circuit is inconsistent with the decisions of this Court and decisions in other circuits, the petitioner respectfully asks that a writ of certiorari be granted.

Respectfully submitted,

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PROOF OF SERVICE

I hereby certify that a copy of the Petition for Writ of Certiorari was mailed, first class mail, on the _____ day of May, 1993, to the following:

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_____

ANDREW P. McCORMICK

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-2580
(Summary Calendar)

WILLIAM JUSTIN DELEONARDIS,
Plaintiff-Appellant,

versus

MARY WEISEMAN, Special Counsel,
Office of The Special Counsel, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas
(CA-H-90-3768)

Before KING, DAVIS, and WIENER, Circuit Judges. PER CURIAM*:

In this handicap discrimination case, Plaintiff-Appellant William Justin DeLeonardis appeals the grant of summary judgement in favor of Defendants-Appellees Mary

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

Weiseman,[1] Special Counsel for the Office of The Special Counsel (OSC), et al. Finding no reversible error in the district court's grant of summary judgment, we affirm.

I.

FACTS AND PROCEEDINGS

In January 1986, DeLeonardis became a Supervisory Attorney Advisor in the Houston, Texas, office of the Social Security Administration (SSA). He served in that capacity for over four years, receiving several outstanding service awards and earning the high regard of most of his superiors.[2] In June 1990, DeLeonardis was demoted to the position of Attorney-Advisor, with a commensurate reduction in his pay level.[3]

The circumstances of DeLeonardis demotion have been the subject of this and another lawsuit, as well as several administrative actions. Our reading of the controlling law as to our review of this case leads us to conclude that a full explication of the details of DeLeonardis's demotion is not necessary. Essentially, DeLeonardis asserts that his demotion and the subsequent poor working environment that he was forced to abide resulted from the homophobic reaction of one of his superiors (Regional Chief Administrative Law Judge Richard Mueller) to the revelation that DeLeonardis is homosexual and had written (under a

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[1] We note that Kathleen Day Koch was substituted as a party for Ms. Weiseman in the district court. The filings with this court, however, represent Ms. Weiseman as the proper party.

[2] The record contains affidavits of praise from at least five of the Administrative Law Judges with whom DeLeonardis served.

[3] DeLeonardis was moved from a GM-13 level to a GM-11 level.

pen-name while off-duty) a story for a magazine for gay men. He asserts that the demotion violated his first amendment speech and association rights. He also alleges discrimination based on his handicapped status; he has cerebral palsy. Disagreeing, the SSA asserts that the demotion occurred because DeLeonardis mishandled the supervision of an errant employee.

As an employee of the SSA, DeLeonardis had no right to appeal his demotion to the Merit System Protection Board (MSPB) after his grievance was denied by the SSA itself. He was, however, entitled to petition the OSC to investigate his claim of a prohibited personnel practice,[4] which he did. The OSC performed an initial investigation into the circumstances of the demotion but decided not to conduct a full investigation.

At the same time that he was trying to get the OSC to investigate of his demotion, DeLeonardis continued his efforts to regain his position as a supervisor by means within the SSA. These efforts eventually produced a settlement agreement with the SSA, which was entered into in October 1991. In accordance with the agreement, the SSA changed the demotion to a "voluntary change to a lower grade," adjusted his pay to the level at which he had been compensated prior to the demotion, purged his personnel file of all pertaining to the demotion, and made several personal accommodations for DeLeonardis. The agreement also contained a reservation clause in which DeLeonardis expressly reserved the right to continue the instant litigation.

DeLeonardis had filed the instant action in an attempt to compel the OSC to perform a full investigation of the complaint he had filed with that agency concerning his

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[4] 5 U.S.C. § 12, 23 (1988)

demotion. The district court granted summary judgment in favor of the OSC, holding that the decision of the OSC not to perform a full investigation after it had performed a preliminary investigation was unreviewable. DeLeonardis timely appealed the order of the district court.

II.

ANALYSIS

The OSC must "investigate the allegation [of a prohibited personnel practice] to the extent necessary to determine whether there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken," and bring correct action "whe[n] appropriate."[5] In *Wren v. Merit System Protection Board*, the D.C. Circuit stated:

> [W]hile the scope of an initial OSC investigation need only be extensive enough to determine whether there are reasonable grounds to believe a prohibited personnel practice is occurring, has occurred, or will occur, [s]ome preliminary inquiry will . . . be necessary . . . to determine whether the charge warrants a thorough inquiry."[6]

Once the OSC has conducted its initial inquiry, however, the *Wren* court continued, "it is . . . quite clear from the statutory language and legislative history that Congress did

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[5] Id. §§ 1212(a)(2), 1214(a)(1)(A).

[6] 681 F.2d 867, 874 (D.C. Cir. 1982) (quoting II House Comm. on the Post Office and Civil Service, 95th Cong., 1st Sess., Legislative History of the Civil Service Reform Act of 1978, at 1496).

not mean to make the OSC's decisions to terminate or conduct an investigation or bring a proceeding before the Board reviewable on the merits."[7]

We have recognized and approved the *Wren* court's reasoning that an employee's right to obtain judicial review of the OSC's decision not to pursue a complaint is "limited to [the question of] whether the OSC discharged its duty to investigate the complaint."[8] We agree with our colleagues of the D.C. Circuit that when the OSC decides to terminate an investigation that it began pursuant to a complaint, the decision is not reviewable.

The district court correctly stated the law applicable to the facts of the instant case:

> In this case the OSC conducted a preliminary investigation of plaintiff's allegations, referred his handicap discrimination to the EEOC, and concluded that further inquiry was unnecessary because the evidence did not indicate that prohibited personal practices had occurred. Plaintiff does not contend that OSC failed to investigate his complaint; he contends that the investigation was inadequate. Under these facts the court cannot order OSC to conduct an additional investigation of

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[7] *Id.* at 875 n.9 (citing Senate Comm. on Governmental Affairs, 95th Cong., 2d Sess., Markup Sess. on S.2640 *(Civil Service Reform Act of 1978)*, at 85-86 (unpublished transcript of May 22, 1978); House Comm. on Post Office and Civil Service, 95th Cong., 2d Sess., Markup Meetings on H.R. 11280 *(A Bill to Reform the Civil Service Laws)*, at 46-47 (Comm. Print 1978)).

[8] *Towers v. Horner*, 791 F.2d 1244, n.14 (5th Cir. 1986) (citing *Wren*, 681 F.2d at 875 n.9).

> plaintiff's claims, nor will the court second guess OSC's decisions to abandon or defer claims following its preliminary investigation.

DeLeonardis nevertheless insists that courts are allowed to look behind the agency's decision to terminate an investigation when, as he claims it did here, the agency applies the incorrect legal standard in deciding to terminate the investigation.[9] But DeLeonardis fails to recognize, or at least to admit, that to allow him to succeed on this argument we would have to vitiate the clearly established rule that we do not look behind substantive OSC determinations to terminate investigations. We are neither willing nor authorized to do so.

The OSC is also correct in asserting that DeLeonardis's appeal has been mooted by the settlement agreement that

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[9] DeLeonardis asserts that in terminating the investigation, the OSC improperly presumed a nexus between his off-duty activities and his on-duty performance. In its letter informing him of the termination of the investigation, the OSC stated:

> When you attempted to take action against [an] employee [whom you had allowed to obtain information about your lifestyle and writing], the employee used this information as an affirmative defense. While your action against the employee was ultimately sustained by higher management, *the agency did have to spend resources and time* reviewing the allegations the employee made against you. Thus, your conduct off-duty did have an adverse on the agency, and we find no further basis for inquiry into your allegations of a violation of 5 U.S.C. § 2302(b)(10).

(Emphasis added). Although we agree with DeLeonardis that the nexus recognized by the OSC was improper (the fact that the agency had to expend resources and time investigating specious claims--that arose because of his off-duty lifestyle and activities--of one of DeLeonardis's subordinates cannot be used as a nexus in this situation), forcing the OSC to conduct the investigation because of this error would be a reversal of the agency's discretion on substantive grounds.

he entered into with the SSA. The OSC's argument is straight-forward and unassailable. It points out that there would be nothing for the OSC to investigate if it were ordered to reopen DeLeonardis's case. This is so, it notes, as a result of the expunging of all records of the demotion pursuant to the provisions of the settlement agreement. We agree that the effect of the plain language of that agreement was the deletion from DeLeonardis's file of all data that the OSC might investigate.

DeLeonardis urges that the OSC's argument is no more than an attempt to use the settlement agreement, to which the OSC was not a party, to "shirk its statutory duty to protect Appellant's constitutional rights. Continuing, he asserts that "the settlement of his discrimination claim for less than full reinstatement with back pay at the GM-13 level does not moot his constitutional claims for full reinstatement with back pay." The fatal problem with his argument is that he asks us to require the OSC to do something that he has rendered it unable to do--investigate an incident that he has contracted to have expunged from the SSA's files. Although it is clear that DeLeonardis has not been made whole by the settlement--he is no longer a supervisor with the SSA--he seeks in this lawsuit to compel an agency to do something that he has made impossible.

III.

CONCLUSION

Although the record in this case demonstrates rather serious unfairness in the demotion of DeLeonardis, it is a wrong that is beyond the authority of this court to redress. We cannot review the substantive decision of the OSC to discontinue an investigation for lack of cause once it has commenced one in response to an employee's request. We

also note in passing that even if we were to compel the OSC to reinstate and perform a full investigation, it would be placed in the impossible situation of reviewing a record expunged of any evidence of the potential wrongdoing. The district court's grant of summary judgment is
AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
(stamp) JUL 2 1992
Jesse E. Clark, Clerk
By Deputy, S/(illegible)

WILLIAM JUSTIN DELEONARDIS,	§	
	§	
Plaintiff,	§	
	§	
v.	§	CIVIL ACTION
	§	NO. H-90-3768
KATHLEEN DAY KOCH,	§	
Special Counsel,	§	
Office of the Special Counsel,	§	
Defendant.	§	

FINAL JUDGMENT

In accordance with the Court's Memorandum Opinion granting Defendant's Motion for Summary Judgment, this action is DISMISSED.

This is a FINAL JUDGMENT.

SIGNED at Houston, Texas, on the 1st day of July, 1992.

S/ Sim Lake

SIM LAKE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

WILLIAM JUSTIN DELEONARDIS,	§	
	§	
Plaintiff,	§	
	§	
v.	§	CIVIL ACTION
	§	NO. H-90-3768
KATHLEEN DAY KOCH,	§	
Special Counsel,	§	
Office of the Special Counsel,	§	
Defendant.	§	

MEMORANDUM AND ORDER

Pending before the Court is Defendant's Motion for Summary Judgment. (Docket Entry No. 14) For the reasons explained below, the motion will be granted.

FACTS

On June 23, 1990, plaintiff, William Justin DeLeonardis, was demoted from his position as Supervisory Attorney-Advisor with the Office of Hearings and Appeals of the Social Security Administration (now the Department of Health and Human Services). As a result of his demotion plaintiff lost his supervisory position, salary and benefits, and was allegedly stigmatized as an undesirable management employee. (Plaintiff's Supplemental Memorandum, Docket Entry No. 26, pp. 1-2) Plaintiff filed an intra-agency grievance alleging that the grounds for his demotion were pretextual. The grievance was denied. (Defendant's Exhibit 5, Docket Entry No. 13)

On September 4, 1990, plaintiff filed a complaint with the Office of the Special Counsel (OSC) alleging that his demotion resulted from personnel practices prohibited by 5 U.S.C. § 2302. As a nonpreference member of the excepted civil service, plaintiff was not entitled to appeal his complaint directly to the Merit Systems Protection Board (MSPB), but was entitled to petition the OSC. The OSC is an independent agency authorized to investigate and prosecute prohibited employment practices.[1] At its discretion, OSC may present cases to the MSPB on behalf of an aggrieved employee. The employee may then appeal an adverse order of the MSPB to the Court of Appeals for the Federal Circuit, or to the appropriate district court if discrimination is alleged. 5 U.S.C. § 7703(b). The OSC normally defers discrimination claims to the Equal Employment Opportunity Commission (EEOC) in order not to duplicate EEOC procedures. (Defendant's Exhibit 4, p. 5, Docket Entry No. 13)

In the complaint he filed with the OSC plaintiff alleged that the reasons for his demotion were pretextual, that the Social Security Administration discriminated against him because of a physical handicap, that the agency based its actions on conduct that occurred while plaintiff was off duty and that the agency's action violated the plaintiff's rights

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[1] The Office of the Special Counsel was established on January 1, 1979, by Reorganization Plan Number 2 of 1978. The Civil Service Reform Act of 1978, which came into effect on January 11, 1979, enlarged its functions and powers. OSC operated as the autonomous investigative and prosecutive arm of the Merit Systems Protection Board until 1989. In March of 1989, Congress passed the Whistleblower Protection Act of 1989, which became effective on July 9, 1989. This Act converted the Office of the Special Counsel into an independent agency within the Executive Branch, separate and apart from the MSPB, and renamed it the Office of Special Counsel. The OSC kept its basic investigative and prosecutive functions and its role in litigating cases before the MSPB.

under the First Amendment to the Constitution. (Defendant's Exhibit 5, Docket Entry No. 13) After reviewing documents pertaining to plaintiff's allegations and talking with plaintiff, the OSC concluded that the evidence of prohibited personnel practices was insufficient. (Defendant's Exhibit 3, Docket Entry No. 13) In a November 13, 1990, letter to plaintiff, the OSC summarized its reasons for declining a field investigation and suggested that plaintiff contact the EEOC if he desired to pursue his handicap discrimination claim. (Defendant's Exhibit 1, Docket Entry No 13)

In December of 1990 plaintiff filed this action against the OSC alleging that it failed to investigate adequately his complaint as mandated by S U.S.C. § 1214. Plaintiff alleged that OSC ignored evidence of First Amendment violations and misapplied the legal standard that creates a nexus between off-duty conduct and on-duty performance. He also alleged that OSC improperly exercised legislative power by deferring his handicap discrimination claim to the EEOC in violation of Congressional intent. (Complaint for Equitable Relief, Docket Entry No. 1) Although plaintiff did not allege any specific harm from the OSC action (or inaction), he later argued that he was stigmatized because the demotion violated his constitutional rights to privacy, freedom of association, and freedom of expression. (Plaintiff's Supplemental Memorandum, Docket Entry No. 26, pp. 1-2) Plaintiff sought an order from this court compelling OSC to conduct a full, fair, and adequate investigation in accordance with proper legal standards. (Complaint for Equitable Relief, Docket Entry No. 1) In later briefing plaintiff contended that such an investigation could lead to full reinstatement and disciplinary action against his supervisors. (Response to Court Order, Docket Entry No. 21, p. 3, and Plaintiff's Supplemental Memorandum, Docket Entry No. 26, p. 2)

In 1991 plaintiff and the Department of Health and Human Services (DHHS) executed a settlement agreement styled, "Informal Resolution Adjustment of the Discrimination Complaint of William DeLeonardis, SSA 736-90." As part of this agreement DHHS altered its documentation to reflect a voluntary change in grade rather than a demotion. DHHS did not return plaintiff to his former supervisory position but did increase his pay and provide back pay, attorney fees, a personal computer, and additional office space. In return plaintiff withdrew his handicap discrimination complaint, but reserved the right to continue this action. (Plaintiff's Response to Court Order, Docket Entry No. 21, Exhibit 1)

On July 18, 1991, the court denied defendant's motion to dismiss for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6) because defendant relied on matters outside the pleadings. The parties then filed cross-motions for summary judgment. On February 4, 1992, the court denied plaintiff's motion for summary judgment and requested additional briefing on whether this action has been mooted by plaintiff's settlement agreement with DHHS.

DISCUSSION

The court has subject matter jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. Because plaintiff alleged that OSC failed to conduct an adequate investigation as mandated by 5 U.S.C. § 1214 (Complaint, Docket Entry No. 1, p. 2), subject matter jurisdiction exists under 28 U.S.C. § 1331.

The OSC is required to investigate complaints of prohibited personnel practices and "where appropriate" bring

corrective action. 5 U.S.C. § 1212(a)(2). In addition, the OSC "shall investigate the allegation to the extent necessary to determine whether there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken." 5 U.S.C. § 1214(a)(1)(A). The plain language of these statutes and their legislative history reflect that OSC must conduct a preliminary inquiry to determine if reasonable grounds warrant a thorough inquiry. *Wren v. Merit Systems Protection Board*, 681 F.2d 867, 874 (D.C. Cir. 1982). The OSC conducts an initial examination through its Complaints Examining Unit, and, if warranted, conducts an extensive examination through its Investigation Division. (Defendant's Exhibit 4, p. 3, Docket Entry No. 13) Congress intended that OSC develop such a system to screen out unmeritorious claims. *Wren*, 681 F.2d at 875, n.9. If OSC does find sufficient evidence of prohibited personnel practices, it may seek corrective action through the MSPB or the agency under investigation. *Towers v. Horner*, 791 F.2d 1244, 1246 (5th Cir. 1986).

Although the OSC is authorized to investigate allegations of handicap discrimination, which is a personnel practice prohibited by 5 U.S.C. § 2302(b)(1)(D), the EEOC is also authorized to investigate discrimination claims. *See* 29 C.F.R. 1613.701-.806 (1991) (EEOC complaint procedures for handicap discrimination). The OSC "will normally avoid duplicating" EEOC procedures and "will defer to those procedures rather than initiating an independent investigation." 5 C.F.R. § 1801.1 (1992) (superseding 5 C.F.R. § 1251.3). OSC's deferral policy is discretionary based upon the conclusion of its preliminary investigation. The deferral policy in effect at the time of plaintiff's complaint to OSC stated that the Special Counsel will investigate discrimination claims when OSC "determines this to be necessary or appropriate." 5 C.F.R. § 1251.3 (1989). The OSC's deferral policy is consistent with the mandate of 5 U.S.C. §

1212 because it allows OSC to pursue or abandon in-depth investigation where appropriate.

If the OSC fails to perform its statutory duty, a district court can compel OSC to conduct an investigation. *Wren*, 681 F.2d at 872. However, a district court may not review OSC's decision to terminate its investigation, *Wren*, 681 F.2d at 875, n.9, or OSC's decision not to petition the MSPB. *Towers*, 791 F.2d at 1246. Judicial review of OSC's action is limited to insuring compliance with the statutory requirements of an investigation to the extent necessary to determine if the allegations are meritorious. *Borrell v. U.S. International Communications Agency*, 682 F.2d 981, 988 (D.C. Cir. 1982).

In this case the OSC conducted a preliminary investigation of plaintiff's allegations, referred his handicap discrimination claim to the EEOC, and concluded that further inquiry was unnecessary because the evidence did not indicate that prohibited personnel practices had occurred. (Defendant's Exhibit 2, Entry No. 13) Plaintiff does not contend that OSC failed to investigate his complaint; he contends that the investigation was inadequate. Under these facts the court cannot order OSC to conduct an additional investigation of plaintiff's claims, nor will the court second guess OSC's decisions to abandon or defer claims following its preliminary investigation.

CONCLUSION

Plaintiff is not entitled to additional relief because OSC conducted a preliminary investigation of plaintiff's claims as required by law. After conducting an initial inquiry, OSC acted within its discretion by deferring plaintiff's handicap discrimination claim to the EEOC. Furthermore, since plaintiff has withdrawn his handicap discrimination claim, his complaint regarding OSC's deferral policy is MOOT. Defendant's Motion for Summary Judgment is GRANTED.

SIGNED at Houston, Texas, on this the 1st day of July, 1992.

SIM LAKE
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

U.S. COURT OF APPEALS
FILED MAR 02 1993
RICHARD E. WINDHORST
Clerk

No. 92-2580

WILLIAM JUSTIN DELEONARDIS,
Plaintiff-Appellant,

versus

KATHLEEN DAY KOCH, Special Counsel,
Office of the Special Counsel, et al.
Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas

ON PETITION FOR REHEARING

(March 2, 1993)

Before KING, DAVIS, and WIENER, Circuit Judge

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT

CLERK'S NOTE
SEE FRAP AND
RULES 41 FOR
STAY OF THE
MANDATE

S/illegible
United States Circuit Judge

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

WILLIAM JUSTIN DELEONARDIS, Plaintiff-Appellant,	)	
v.	)	
	)	NO. 92-2580
MARY WEISEMAN, Special Counsel, Office of the Special Counsel, Defendant-Appellee .	)	

MOTION FOR PUBLICATION OF DECISION

Pursuant to Fifth Cir. R. 47.5.2, Defendant-Appellee Mary Weiseman moves that the Court's decision in this case be published.

1. On January 12, 1993, this Court issued a decision in this appeal affirming the district court's dismissal of Appellant DeLeonardis's suit against Special Counsel Mary Weiseman of the Office of Special Counsel. On March 2, 1993, this Court denied DeLeonardis's petition for rehearing.

2. The Court's ruling in this case merits publication under the standards outlined in Fifth Cir. R. 47.5.1. In particular, this decision definitively establishes that judicial review of the Office of Special Counsel's decision to terminate an investigation into an employee complaint is not judicially reviewable. Decision at 5. This decision makes explicit what was only implicitly suggested in dicta in footnote 14 of this Court's decision in *Towers v. Horner*, 791 F.2d 1244, 1246 n.14 (5th Cir. 1986). The Court's express decision to join the United States Court of Appeals for the

D.C. Circuit in precluding judicial review of such cases thus "establishes a new rule of law" for the Fifth Circuit. Fifth Cir. $. 47.5.1.

3. Publication is also appropriate because the issue presented by this appeal is likely to recur, as other federal employees within the Fifth Circuit's jurisdiction may petition the Office of Special Counsel for review of alleged prohibited personnel practices. The existence of published Fifth Circuit authority defining the scope of judicial review of such actions will promote the uniform and expeditious resolution of similar cases in the future.

For the foregoing reasons, Defendant-Appellee Kathleen Day Koch respectfully requests that this Court's decision of January 12, 1993, be published.[1]

Respectfully submitted,

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(202) 514-3688

PATRICIA MILLETT
(202) 514-3688
Attorneys, Appellate Staff
Civil Division, Room 3343
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10th & Pennsylvania Ave., N.W. Washington, D.C. 20530

[1] We note that the caption to the Court's opinion lists Mary Weiseman as the Defendant-Appellee. However, Kathleen Day Koch was formally substituted as Defendant-Appellee for Mary Weiseman by order of the district court on March 4, 1992. Furthermore, pursuant to Fed. R. App. P. 43(c), substitution of a public officer for her predecessor occurs automatically.

CERTIFICATE OF SERVICE

I hereby certify that on March 4, 1993, I served one copy of the foregoing "Motion for Publication of Decision" upon the following named counsel, by first class, United States mail, postage prepaid:

Andrew P. McCormick, Esquire
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Counsel for Appellee
Kathleen Day Koch